Supreme Court, U.S.
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No. 93-1232

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

KONRADS KALEJS,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

Dated: March 11, 1994

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ADDITIONAL QUESTIONS PRESENTED BY BRIEF IN OPPOSITION

1. Whether this case should be remanded for consideration of materiality of misrepresentation.

2. Whether this case should be remanded for consideration of discretionary relief.

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REPLY BRIEF OF PETITIONER

I. SOVIET DEPOSITIONS EXCLUDED

Respondent repeatedly argues that Petitioner urges a *per se* rule of exclusion of all Soviet depositions. Rather, Petitioner argues the Soviet depositions should be excluded because of the unique facts es-

tablished in the record of this case. The Respondent concedes the following facts surrounding the depositions taken in the then Soviet Union of then Soviet citizens presided over by a Soviet procurator with four other Soviet prosecutors in attendance: both Petitioner and the United States were denied any opportunity for pre-deposition interviews with any of the Soviet videotape witnesses; the Soviets elected to disclose only recent written statements of its witnesses taken by the Soviets in preparation for this case and both Petitioner and the United States were denied the Soviet witnesses' written statements taken nearest the time of the events charged; both Petitioner and the United States were denied free movement within the then Soviet Union to investigate -- all investigation in this case was by the Soviet KGB or Soviet prosecutor's office; both the Petitioner and the United

States as well as Dr. Hilberg[1], Respondent's historian witness, were denied any opportunity to enter or research at Soviet controlled archives. The Respondent cannot vouch for its own witnesses with these restrictions. All documentary evidence from those archives was selected solely by the Soviet Union. Additionally, these archives contain: 1. Documentary evidence the Soviet's decided should not be introduced; 2. Exculpatory documentary evidence; 3. Undisclosed prior written statements of the Soviet selected deposition witnesses dating from near the end of World War II closest to the time of the

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[1] Dr. Hilberg, the Respondent's historian, when asked of the significance of the Soviet's certification stamp on Soviet provided documents stated: "It has no meaning in terms of whether it is an original document, whether it is a copy of a document, even whether it is a manufactured document. I don't place any credence in Soviet stamps." Trial transcript of April 15, 1983 at 363-365, United States v. Kungys, 571 F.Supp. 1104 (D. N.J. 1983).

events alleged in the Order to Show Cause. The materials uncovered subsequent to the dissolution of the Soviet Union are uniformly favorable to the Petitioner. See, Brief for Petitioner, pp. 47 through 54.

The unreasonable and unprecedented restrictions by the Soviet Union on the United States and upon your Petitioner deprived him of a fair opportunity to be heard, cross examine and prepare a defense contrary to due process and contrary to the intent of 8 U.S.C. § 1252(b) and 8 C.F.R. § 242.16 [reasonable opportunity to examine the evidence, to present evidence in his own behalf and to cross-examine].

II REMAINING EVIDENCE IS INSUFFICIENT

Two of the three judges of the Seventh Circuit found the Soviet depositions unreliable and inadmissible. Without crediting these Soviet witnesses there is no evidence [neither testimonial nor documentary] remaining in the record of

Petitioner's alleged assignments as commander of the external guard at Salaspils and Sauriesi Concentration Camps[2]; no evidence of an assignment at a camp for Jews at Porkov, nor of an assignment that involved a unit killing a group of gypsies; nor is there any "eyewitness" identification of Petitioner as a member of Arajs Kommando.

The sole evidence remaining was an admitted assignment with a detachment of Latvian ski troops at the Eastern Front in 1942. BIA held those duties did not constitute participation in persecution.

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[2] Respondent closes its brief in opposition by claiming Petitioner played an active role as a guard commander and a "key officer." The sole evidence admitted bearing of this issue are several of the Soviet depositions. Respondent's contention is much like the Seventh Circuit's "lead" opinion that stated it will not discard a case against a Nazi collaborator merely because some of the evidence originated in the Soviet Union. As the dissent pointed out this assumes the petitioner's guilt when that is precisely what is in issue. (Pet. App. 78).

(Pet. App. 326,7). In spite of this the Seventh Circuit ordered Petitioner deported for participation in persecution.

Judge Manion joined the "lead" opinion with the simple yet unelaborated statement, "I think the untainted evidence supports the Board's decision." The "untainted" evidence is, and can only be, evidence other than the Soviet depositions Seventh Circuit Judges Manion and Eisele believed inadmissible. Respondent in its Brief in Opposition succinctly states what this evidence is:

> "Perhaps the clearest finding of persecution that is independent of Soviet deposition testimony is the finding related to petitioner's service in the Arajs Kommando from July 1941 to January 1942. The Board's conclusion that petitioner's service during that period involved persecution (Pet. App. 341-345) rests almost exclusively on the testimony of Dr. Hilberg regarding the operations of the Arajs Kommando during that period, which the court of appeals characterized as "unrebutted," *id.* at 341, together with documentary evidence that established the nature of the Kommando's operation during that period, as well as petitioner's role in those operations."

Footnote 7, Brief in Opposition, page 17.

The Board of Immigration Appeals agreed with the Respondent. However, this quoted portion of the Respondent's Brief is factually inexact. The last phrase is wholly false -- "as well as petitioner's role in those operations" is totally unsupported by any documentary evidence or, for that matter, "eyewitness" testimony. On this very point -- what Respondent calls the clearest instance of proof of Petitioner's participation in persecution -- the Immigration Judge stated:

> "No witness, including (Soviets) Leonids Jansons and Rolands Bahsteins, the only witnesses to identify Kalejs as a member of the Security Police during this period, and no documentary evidence presented, identified the respondent as holding some position with the Arajs Kommando prior to January 1942. [a detachment of Latvian troops at the Eastern Front] . . . the evidence reflects that the respondent signed his name to the rolls of the Arajs Kommando in July [1941]. **There is no evidence of participation or assistance beyond this act . . .**"

[Emphasis Supplied] (App. 175,6)

In this "clearest" instance -- and the only one supported at all without Soviet deposition evidence -- the Board of Immigration Appeals and the Immigration Judge reached opposite results. In Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985), the Ninth Circuit was faced with a similar situation of incongruity of the findings between the Immigration Judge and the Board of Immigration Appeals. In reversing the decision of the Board of Immigration Appeals the court stated:

> "We first note that in a deportation case, the INS has the burden of proving its case by clear, convincing and unequivocal evidence which does not leave the issue in doubt. . . . On review, we must consider whether there is reasonable, substantial and probative evidence in the record, when considered as a whole, to support a finding that each material fact has been established by clear, convincing and unequivocal evidence. . . . However, this court has observed that in a situation where the hearing examiner and the Agency have reached opposite results, the appellate court's reviewing eye may be more searching . . . Even when there is independent, credited evidence of the Board's decision, a reviewing court will

> scrutinize the Board's findings of fact more critically if they contradict the ALJ's factual conclusions than if they are in accord with the ALJ's findings." 750 F.2d at 1429.

The incongruity of findings requires, or at least permits, the Court to scrutinize the findings here more critically. The Seventh Circuit failed to take a searching or critical look at this issue. Perhaps if Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993) with its revelation of fraud perpetrated on that court by attorneys from the office prosecuting this case, had been decided sooner, the Seventh Circuit may have taken a more searching and critical look. Should the Court find participation in persecution was insufficiently supported by reasonable, substantial and probative evidence, the matter should be remanded concerning the misrepresentation issue.

III REMAND NECESSARY ON MISREPRESENTATION ISSUE AND DISCRETIONARY RELIEF

On his visa application Petitioner failed to disclose his admitted military service on behalf of the Germans.[3] The Board of Immigration Appeals held his admitted service in a detachment of Latvian ski troops at the Eastern Front did not constitute participation in persecution within the meaning of the Holtzman Amendent (Pet. App. 326,7). He may, or may not, be deportable on the material misrepresentation count alone depending upon a determination of materiality to be made that does not depend upon a finding

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[3] Petitioner had been interned in a displaced persons camp following the War. The Displaced Persons Act denied relief to persons who had assisted the enemy forces. Service in a detachment of Latvian Ski troops and in the Latvian Legion may have disqualified him under the DPA. See, Fedorenko v. United States, 449 U.S. 490 (1981). However, Petitioner was not admitted under the DPA. He was admitted as a regular quota immigrant where such service does not constitute a disqualification. Petitioner's expressed belief that he would not have been eligible for immigration is not relevant to whether he was in fact disqualified.

of participation in persecution. This issue was not decided below since the lower tribunals erroneously found Petitioner participated in persecution.

Furthermore, when a finding of deportability rests on material misrepresentation alone Petitioner is eligible for discretionary relief. See Brief for the Respondent in Opposition, page 17, footnote 7. Petitioner's request for discretionary relief was simply denied by the Immigration Judge based upon the finding of participation in persecution. With the finding of participation in persecution insufficiently supported, a hearing is required before the Immigration Judge on two issues: 1. Materiality of the misrepresentation and, if the misrepresentation is found to be material; 2. Whether discretionary relief should be granted.

IV <u>BRADY</u> ERROR

Respondent recognizing the exculpatory

nature of the undisclosed numerous prior written statements of the Soviet depositions witnesses defends on the basis that the Respondent did not have those statements. But, the Respondent does not attempt to defend its failure to produce the book, SALASPILS DEATH CAMP. This book names a 1st Lt. Tone as commander of the external guard at Salaspils. It does not name the Petitioner as commander of the external guard at Salaspils. This evidence withheld by Respondent would have substantially aided in undermining Respondent's most emotional argument that Petitioner was a "guard commander and a "key officer." The Respondent had this book in its possession at the time the Soviet depositions were taken in the Soviet Union and extracted a copy of just one page of that book as evidence in this case. Subsequently, the Petitioner obtained a copy of this book. Respondent should have, but

failed, to produced this book pursuant to Petitioner's request under Brady v. Maryland, 373 U.S. 83 (1963). In Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), the Sixth Circuit found several of Respondent's attorneys from the same prosecuting office engaged in this case guilty of fraud for withholding exculpatory evidence. The avenue to the new evidence that saved Mr. Demjanjuk from wrongfully hanging in Israel included additional materials gathered after the fall of the Soviet Union. These materials were only the tip of the iceberg. In Demjanjuk, the former Director of the Office Special Investigations (OSI), Ryan, testified it is "fundamentally unfair" not to follow the Brady principle in OSI cases. Ryan testified he intended his office make full disclosure of exculpatory material. The basis of the Order to Show Cause and the decisions below against Petitioner charge

him with the commission of war crimes. The OSI director's interpretation of required fundamental fairness -- which his former office refuses to follow -- in OSI cases is persuasive.

V REVIEW IS NOT LIMITED TO RECORD

Respondent states that 8 U.S.C. § 1105a(a)(4) limits a court's review "solely upon the administrative record ..." However, 28 U.S.C. § 2347(c) provides:

> "If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that -
> (1) the additional evidence is material; and
> (2) there were reasonable grounds for failure to adduce the evidence before the agency; the court may order the additional evidence . . . to be taken by the agency . . ."

Such application was made to the court of appeals without ruling. Such application was made to the Court. See, Brief for Petitioner, page 54. The materials lodged with Justice Stevens with Petition-

er's application for stay and bond demonstrate substantial materiality. The iron curtain's existence and the raging of the cold war prior to and throughout the hearings below constitutes reasonable grounds for failure to adduce the evidence below that was secreted by the Soviet Union.

A remand to the Agency to take additional evidence is provident for two reasons. Firstly, there is judicial economy in avoiding proceeding with the Petition to Reopen that was filed last year with the Board of Immigration Appeals and then through subsequent appeals of the Board's decision on that petition via the usual appellate routes. Secondly, Respondent's attorneys in what they term a "Nazi War Criminal" case, as this writer has experienced, proceed not with a bag and baggage letter with a demand for surrender at a time and place certain, but rather proceed with surrounding a person's home at 5:00

a.m. the morning following denial of certiorari with arrest and incarceration. The Petitioner is 80 years of age suffering from cancer and has had deposited $750,000, 100%, cash bond.

VI CONFLICT AMONG THE CIRCUITS

The Respondent has referred the Court to their Brief for the Respondent in Opposition filed in Liudas Kairys v. Immigration and Naturalization Service, October Term, 1992, 92-7982, for their position on the issue of the conflict among the circuit courts regarding what constitutes participation in persecution under the Holtzman Amendment. The Brief filed in the Court for Kairys and his Reply are commended to the Court.

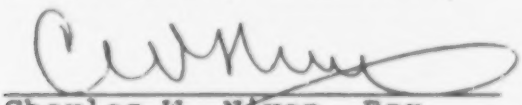
CONCLUSION

The Court should exercise its supervisory power to insure uniformity among the Circuits and insure vital procedural and evidentiary standards are respected below.

A writ of certiorari should issue.

Dated: March 11, 1994

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